No. 12,414

IN THE

United States Court of Appeals

For the Ninth Circuit

PHIL DAVIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Cases

Statutes

Texts

Tahoe is not within the admiralty and maritime jurisdiction of the United States in that its waters have no connection with the ocean, and (2) that the legal navigability of Lake Tahoe is dependent on factual issues which should have been left to the jury.

Appellant's "Statement of Facts", so far as it goes, is on the whole acceptable. It contains a recital of facts in evidence which are undisputed and unimpeached. It also recites a set of facts of which it is admitted the Court is entitled to take judicial notice. Either group of facts taken alone, and most certainly both together, establish at the least that Lake Tahoe is a navigable body of water affording a channel for interstate waterborne commerce. This, without more, it will be developed, legally defines the waters of Lake Tahoe as navigable waters of the United States, proves the applicability of the sanctions of the Motor Boat Act of 1940 to those waters, and the correctness of the given instruction.

In two respects, appellee submits, the statement contains inaccuracies. Thus, strictly speaking, the testimony of the witness, Brenzel, as to the present day commercial use of Lake Tahoe, is that in addition to a big boat carrying passengers on a tour of the lake (Tr. R. 16), there are also sightseeing boats carrying passengers for hire which leave points on the California side and contact points on the Nevada side (Tr. R. 13, 14). Further, the statement that the Lake is completely surrounded by national forests is not correct, if the impression meant to be conveyed is that there is no privately owned land around Lake

Tahoe or that the lands bordering the Lake are controlled by the United States and withdrawn by it from all commercial activity, enterprise and development. It is a matter of common knowledge that the Lake is a recreation center of international repute and popularity; that its shores are spotted with numerous towns, settlements and resorts to which large numbers of visitors, as well as owners of permanent summer homes located at the lake shore, travel every year via the several excellent motor vehicle highways leading to it. There are other relevant facts, not mentioned by appellant, of which the Court might take judicial notice. These will be referred to in the argument, although not because it is believed any further proof beyond the record evidence, is at all necessary to uphold the correctness of the given instruction.

QUESTION PRESENTED.

The question then is:

Did the District Court Err in Instructing the Jury as a matter of law, that Lake Tahoe is a navigable body of water within the jurisdiction of the United States?

SUMMARY OF ARGUMENT.

I.

The Motor Boat Act of 1940 applies to all navigable waters of the United States.

II.

The Motor Boat Act of 1940 represents a valid exercise by Congress of the National Power to Regulate Interstate Commerce; also of the constitutional grant to the United States of admiralty and maritime jurisdiction.

III.

Lake Tahoe is a navigable water of the United States; as a public waterway, it is subject to national regulation and control, and subject consequently, to the terms of the Motor Boat Act of 1940; absence of outlet to the sea does not affect its character.

IV.

The character of Lake Tahoe as navigable water of the United States was established by inherently credible evidence which was undisputed and unimpeached; and by facts of which the Court can take judicial notice. The District Court, therefore, properly instructed the Jury that "Lake Tahoe is a navigable body of water within the jurisdiction of the United States".

ARGUMENT.

I. THE MOTOR BOAT ACT OF 1940 APPLIES TO ALL NAVIGABLE WATERS OF THE UNITED STATES.

The Motor Boat Act of 1940 is entitled "An Act to Amend Laws for preventing collisions of vessels, to regulate equipment of said motor boats *on the*

navigable waters of the United States, and for other purposes". (April 25, 1940, c. 155, 54 Stat. 163). Its scope and objective are apparent from its title. The statement in appellant's brief (p. 33) that the Act does not define the waters to which the regulations shall apply is, therefore, incorrect. In *Kelly v. Washington* (1937) 302 US. 1, at page 4, the Supreme Court observed that the body of regulations of which this Act is a part, relate to the navigable waters of the United States.

II. THE MOTOR BOAT ACT REPRESENTS A VALID EXERCISE BY CONGRESS OF THE NATIONAL POWER TO REGULATE INTERSTATE COMMERCE; ALSO OF THE CONSTITUTIONAL GRANT TO THE UNITED STATES OF ADMIRALTY AND MARITIME JURISDICTION.

In *Miami Beach Jockey Club v. Dern* (Dist. Col. Ct. Appeals, 1936) 83 F. (2d) 715, cert. den. 299 U.S. 556, the Court stated:

> "The United States derives its power over the waterways of the nation from two separate constitutional grants—the one the power to regulate foreign and interstate commerce (Article 1, Section 8, cl. 3) the other the exclusive grant of admiralty and maritime jurisdiction (Article 3, Sec. 2, cl. 1). They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants."

The Act here involved prescribes standards for the safe conduct of navigation on public navigable waters. Having that objective, it is submitted that the Act

is both a regulation of interstate commerce and the declaration of a substantive rule of admiralty law. Appellant admits the latter to be true, and certainly, to the extent that the Act prohibits and penalizes conduct tantamount to a maritime tort, it is lawful congressional legislation pursuant to the National Admiralty and Maritime jurisdiction.

In *Miller v. United States* (9th Cir. 1937) 88 F. (2d) 102, at page 104, this Court said:

> "The Constitution of the United States provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction (Art. 3, Sec. 2, cl. 1). Although, in the absence of legislation by Congress, the courts merely by virtue of this grant of judicial power have no jurisdiction of maritime crimes and offenses, * * * this clause does give Congress power to provide for the punishment of offenses committed upon any navigable waters other than those of the high seas, although within the jurisdiction of a state * * * "

However, Appellant states as his belief, that when Congress enacted the Act, it did so without any belief that its power was derived from the Commerce Clause of the Constitution (opening Brief, p. 4). The statement is wholly unjustified and unjustifiable. The entire Act is devoted to the prescription of regulations aimed to promote safety in navigation. The effect on commerce, of compliance or violation with measures directed to safe navigation is not debatable. In *Kelly v. Washington,* supra, the Supreme Court

examined and analyzed the scope of the Motor Boat Act of 1910, (36 Stat. 462), to determine to what extent Congress, *in the exercise of its power over interstate and foreign commerce,* had legislated on inspection requirements for the hull and machinery of motor vessels. It is admitted (opening brief, p. 33) that the later Motor Boat Act of 1940 was but amendatory of all the statutes previously passed relating to regulation of motor boats, which included, of course, the former Motor Boat Act of 1910. Moreover, the Supreme Court declared at an early date that commerce included navigation and that

> "the power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie * * * For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament in England."

> "It is for Congress to determine when its full power shall be brought into activity, and as to

the regulations and sanctions which shall be provided."

Gilman v. Philadelphia (1865), 70 U.S. (3 Wall.) 713, 724, 725.

Again in 1940, the Supreme Court said:

"The power of the United States over its waters which are capable of use as interstate highways arises from the Commerce Clause of the Constitution * * * It was held early in our history that the power to regulate commerce necessarily included power over navigation."

United States v. Appalachian Power Co. 311 U.S. 377, 404.

Many other decisions of the Supreme Court have recognized that the power of Congress to enact legislation governing and relating to navigation on navigable waters of the United States emanates from the Commerce Clause, and that such power is a plenary one. *The Daniel Ball,* 77 U.S. (10 Wall.) 557; *United States ex rel. Greathouse v. Dern,* 289 U.S. 352; *County of Mobile v. Kimball,* 102 U.S. (12 Otto) 691; *Cardwell v. American Bridge Co.,* 113 U.S. 205; *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53; *Economy Light & Power Co. v. United States,* 256, U.S. 113.

III. LAKE TAHOE IS A NAVIGABLE WATER OF THE UNITED STATES; AS A PUBLIC WATERWAY, IT IS SUBJECT TO NATIONAL REGULATION AND CONTROL, AND SUBJECT, CONSEQUENTLY, TO THE TERMS OF THE MOTOR BOAT ACT OF 1940; ABSENCE OF OUTLET TO THE SEA DOES NOT AFFECT ITS CHARACTER.

In 1870, the United States Supreme Court in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, framed the verbal yardstick by which the term "navigable waters of the United States" has since been measured. There the Court was construing the term as used in a federal statute making it unlawful to transport freight or passengers by steamboat over such waters, without the license required by federal law. At page 563, the Supreme Court said:

> "These rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact *when they are used, or are susceptible of being used,* in their ordinary condition, *as highways for commerce, over which trade and travel are or may be conducted* in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway *over which commerce is or may be carried on* with other States or foreign countries in the customary modes in which such commerce is conducted by water." (Italics supplied.)

The rule of *The Daniel Ball* and the language in which it is couched has been followed and repeated in numerous Supreme Court decisions. See:

The Montello, 87 U.S. (20 Wall.) 430, 439;
Economy Light & Power Co. v. U.S., 256 U.S. 113, 121;
Oklahoma v. Texas, 258 U.S. 574, 586;
United States v. Holt Bank, 270 U.S. 49, 56.

The only change made to date in the definition of *The Daniel Ball* was one of enlargement and of extension. In *U.S. v. Appalachian Power Co.,* 311 U.S. 377, the Supreme Court held that navigable waters of the United States included not only waters capable of navigation in interstate commerce in their *natural condition,* but those which may be rendered so capable by reasonable improvements. Appellee invites the Court's special attention to this last decision for the concise but exhaustive analysis there made of the factors which determine waters to be navigable waters of the United States.

Today, therefore, waters are legally regarded as navigable waters of the United States, subject as such to federal control in the regulation of interstate commerce and the exercise of the nation's admiralty and maritime jurisdiction—whenever they meet two basic requirements for their characterization as such, that is (1) navigability, and (2) capacity for use in waterborne interstate commerce. The waters of Lake Tahoe, in fact and in law, meet and exceed these requirements.

The facts alone of which this Court is entitled to take judicial notice legally establish Lake Tahoe as navigable waters of the United States.

First, as to the navigability of Lake Tahoe, this Court has already taken judicial notice of the considerable size of Lake Tahoe. *Law v. Smith,* 288 Fed. 7, (CCA-9th, 1923). It may also take judicial notice of its navigability, a well known fact attested to by the incident which gave rise to this proceeding. *Arizona v. California,* 283 U.S. 423; *United States v. Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 697; *Wear v. Kansas,* 245 U.S. 154, 158. See also: *Continental Land Co. v. United States,* (9th Cir. 1937) 88 F. (2d) 104, in which this Court took notice of the navigability of the Columbia River as a matter of fact and law.

Second, as to the capacity of Lake Tahoe for use in interstate commerce:

Courts are entitled to take judicial notice of the capacity of waters within their jurisdiction as a medium for interstate commerce. In *The Montello,* 78 U.S. (11 Wall.) 411, the Supreme Court said:

> "We are supposed to know judicially the principal features of the geography of our country, and, as a part of it, what streams are public navigable waters of the United States."

Courts have likewise taken judicial notice that rivers within their jurisdiction are used in interstate commerce.

United States v. Griffin, 58 F. (2d) 674;
United States v. Crary, 1 Fed. Supp. 406.

As to Lake Tahoe, appellee submits that had no evidence whatsoever been introduced to establish the capacity of Lake Tahoe for purposes of interstate commerce, the geographical, historical and notoriously known facts about its waters still warrant judicial notice of the lake's adaptability to serve those ends as they might arise.

Geographically, Lake Tahoe is a long, wide, inland sea of great depth. It is bisected lengthwise and almost in half by the California and Nevada State boundary line. Accessibility to its shores by motor vehicle highways and bus service presents no problem.

Historical reference reveals that in the early days of California's statehood, the lumber industry brought much activity to the shores of the lake. The timber which built the towns of Nevada and lined the shafts and tunnels of its mines was transported across Lake Tahoe from forest to sawmill by schooner and raft.

See:

Fremont Rider's "California" (1925), pages 270 et seq. The MacMillan Co., Publisher.

"California—A Guide to the Golden State," compiled and written by the Federal Writers Project of W.P.A. for California (American Guide Series, 1939), pages 589 et seq. Hastings House, N. Y., Publisher.

This Court is privileged to take judicial notice of these historically recorded facts.

Brown v. Piper, 91 (1 Otto) 37;

The Montello (11 Wall. 411), Supra;

Arizona v. California, 283 U.S. 423.

If the truth were that since the end of the mining days of the West, Lake Tahoe had never again served the ends of interstate commerce, it nevertheless would have still remained and be today a navigable water of the United States; for only an abandonment by Congress can erase the characteristic of a once established navigable water of the United States.

Economy Light & Power Co. v. United States, 256 U.S. 113, 123, 124;

United States v. Appalachian Power Co., 311 U.S. 377.

In *Arizona v. California,* 283 U.S. 423, the Court stated that commercial disuse does not amount to an abandonment of a navigable river *or prohibit future exercise of federal control.*

But commerce on Lake Tahoe did not entirely end with the turn of the century.

The commercial adaptability of Lake Tahoe for uses of the present and memorable past are facts of notoriety. Hardly a native Californian or Nevadan of adult years has not known or at least heard of the old steamboat "Tahoe"; how, until a few years back, it regularly plied its way leisurely around the lake, docking at points in California and Nevada to pick up and drop mail, passengers and provisions. The present day speedier pleasure cruises for hire are also widely known attractions to the annual and extensive tourist trade which now flourishes at "the Lake."

"Commerce is not prevented because the object of it is to serve the pleasure of passengers."

London Guarantee & Accident Company, Ltd. v. Industrial Accident Commission, 279 U.S. 109, 124.

The future commercial potential of Lake Tahoe to again serve the needs of heavier industry and commerce cannot be disregarded. *Economy Light & Power Co. v. United States,* supra; *United States v. Appalachian Power Co.,* supra.

Surrounding the Lake are national forests. Appellant argues that the establishment of forest reserves withdraws the area from potential commercial usefulness (Appellant's Brief, p. 35). The truth is exactly the contrary. The objective of national forest reserves is not aesthetic. The legislative aim is to stimulate the growth of standing timber and to preserve its utilization for eventual commercial and industrial purposes in an economic and unwasteful way. (Title 16 U.S.C., Sec. 471(b) 475). To this end, administrative regulations have been formulated to deal in an orderly manner with the cutting, processing, transport, and export of the timber of national forests. (C.F.R. 1949 Ed. Title 36 Ch. II, Sec. 221.3 —Forest Service). The commercial potential value of Lake Tahoe in connection with the eventual utilization of these surrounding forest reserves is a matter to be reckoned with.

Gilman v. Philadelphia, Supra;

Economy Light & Power Co. v. U.S., Supra;

United States v. Appalachian Power Co., Supra.

In the interim, the land and water within these forest reserves are always open to the public for commercial adaptation not in conflict with conservation of the timber resources. (16 U.S.C. 478, 481, 520, 524, 525.)

The Government of the United States has for many years considered Lake Tahoe one of its navigable waters. This Court should judicially notice the fact that in 1916 Congress asserted national control over Lake Tahoe. It authorized the establishment and maintenance there of aids to navigation. (Act, Aug. 28, 1916, C. 414, Sec. 3, 39 Stat. 538). The fixed and floating aids which, pursuant to such authority, were established and exist at Lake Tahoe today, are a virtual part of the topography of the area; and it is a matter within judicial knowledge that the establishment of such aids to navigation necessarily requires meandering and charting by the United States Coast and Geodetic Survey. (U.S. Coast and Geodetic Survey Chart, 5001). Appellant attaches significance to the fact that no evidence was introduced to show Coast Guard activity at Lake Tahoe; and from the absence of evidence seeks to have this Court understand that there was no such activity and to infer, further, that the United States did not regard itself in control of Lake Tahoe. The activities of the Coast Guard at Lake Tahoe in the enforcement and administration of federal navigation laws is com-

monly known in the area within this Court's jurisdiction. They should be known to appellant. If this Court may resort to geographies and histories (*The Montello,* 11 Wall., Supra) to provide it with facts of which it may take judicial notice, it is respectfully submitted this Court may also take judicial notice of the official activities within its jurisdiction of a department of the United States Government, which can be readily ascertained by official inquiry.

> "* * * A wide variety of matters relating to government and its administration has been judicially noticed."
>
> 31 Corp. Juris, Evidence, Sec. 34, P. 589.

In *Greeson v. Imperial Irr. Dist.* (9th Cir., 1932) 59 F. (2d) 529, this Court held itself bound, by the dictates of the Supreme Court, to take notice of public activities within the common experience of men within the jurisdiction, saying at page 531:

> "And if the judge's memory is at fault he may resort to means he may deem safe to refresh his memory. *Brown v. Piper,* 91 U. S. 37, 236 L.Ed. 200".

At least this Court must notice that it does not follow that the Coast Guard has not assumed jurisdiction of Lake Tahoe from the fact merely that no evidence of its activities there appear in the record of this case.

Appellant argues that in no case has federal admiralty and maritime jurisdiction been extended to waters not connected with the open sea. Since appel-

lant admits that numerous decisions have established inland bodies of water not connected with the ocean to be subject to federal laws in regulation of interstate commerce (opening brief, p. 5), it makes no difference here whether or not this argument of appellant has any substance. The Act is still valid under the commerce clause. But it is nevertheless pertinent to observe that none of the cases or case quotations in appellant's brief support the view that navigable waters useful in interstate commerce must connect with the ocean to sustain federal admiralty and maritime jurisdiction. Analyses of each of appellant's cited cases would unduly lengthen this brief. The total lack of relevancy of all of them to the argument advanced by appellant renders analyses superfluous. Actually, many of the cited cases are directly relied on by appellee; none disaffirm the oft-repeated rule of *The Daniel Ball,* supra, defining navigable waters of the United States,—subject as such to federal control and regulation,—to be those waters affording a capacity for navigation in interstate commerce. Appellee in no way disputes the rule of *Leovy v. U.S.,* 177 U.S. 622 (appellant's brief, p. 22) that waters are not to be regarded as public navigable waters merely because they permit of an interstate journey, without any consideration of their commercial capacity, actual or potential. But outlet to the sea is of no more significance in determining the status of navigable interstate waters for purpose of federal control, than is the ebb and flow of the tide. Of the latter, the Supreme Court, speaking of the

admiralty jurisdiction of the United States over inland lakes, said in *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443:

> "Now, there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

Were the Supreme Court there speaking of outlet to the sea instead of ebb and flow of the tide, its comments would have been the same and a conclusive answer to appellant's position. Recent words of the Supreme Court on the subject of waters within federal admiralty jurisdiction contain no mention of any requirement of connection with the sea. In *Southern S.S. Co. v. Labor Board,* (1942) 316 U.S. 31, at p. 41, the Court stated without reservation;

> "It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country. The Genesee Chief, 12 How. 443."

IV. THE CHARACTER OF LAKE TAHOE AS NAVIGABLE WATERS OF THE UNITED STATES WAS ESTABLISHED BY INHERENTLY CREDIBLE EVIDENCE WHICH WAS UNDISPUTED AND UNIMPEACHED AND BY FACTS OF WHICH THE COURT CAN TAKE JUDICIAL NOTICE. THE DISTRICT COURT, THEREFORE, PROPERLY INSTRUCTED THE JURY THAT "LAKE TAHOE IS A NAVIGABLE BODY OF WATER WITHIN THE JURISDICTION OF THE UNITED STATES".

The navigability in fact and its uses and capacity for use as an interstate waterway for commerce have been proved by the record testimony of F. W. Brenzel (Tr. R. 10-17). His testimony remains uncontradicted and unimpeached. Its credibility is undeniable.

The status of Lake Tahoe which renders it subject to federal navigation laws has been likewise established by facts admittedly a proper subject for the judicial notice of this Court. (Appellant's Brief, pp. 2, 3).

In further confirmation of that status, appellee has related herein further facts within the judicial knowledge of the Court.

Neither the jurisdiction of the United States over the waters of Lake Tahoe nor the jurisdiction of the Court in this proceeding depended in any degree on the settlement of issues of fact by the jury. The issue of jurisdiction was one entirely of law. It was properly resolved in the Court below. And the jury was properly charged that, as an established fact, Lake Tahoe is a navigable body of water under the jurisdiction of the United States of America. *Horning v. District of Columbia,* 254 U.S. 135.

It is respectfully submitted that the judgment of conviction must be affirmed.

Dated, San Francisco, California,
June 26, 1950.

Respectfully submitted,

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